SUPREME COURT OF U. S.

October Term, 1973

No. 73-[illegible]

MARSHALL P. SNYDER, *Petitioner*,

v.

ROBERT W. BLACKWELL, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL STEAMSHIP CO., INC., PRUDENTIAL-GRACE LINES, INC., AND FARRELL LINES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-229

MARSHALL P. SAFIR, *Petitioner,*

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ROBERT W. BLACKWELL, ET AL., *Respondents.*

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BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC.; PRUDENTIAL-GRACE LINES, INC.; AND FARRELL LINES, INC.

OPINIONS BELOW

The Court of Appeals did not render an opinion but its order of May 16, 1973, which gave rise to the present petition, and the opinion and order of the Maritime Subsidy Board of the Department of Commerce, to which the Court's order relates, are set forth in the Appendix to the Petition ("Pet. App."). There is no

opinion or order of the District Court inasmuch as petitioner filed his motion with respect to the opinion and order of the Maritime Subsidy Board directly with the Court of Appeals.

The order of the Court of Appeals (Pet. App. 1a) is unreported. The opinion and order of the Maritime Subsidy Board (Pet. App. 15a-87a) is reported at 13 Pike & Fischer Shipping Regulation Reports 809 (April 16, 1973).[1]

JURISDICTION

The order of the Court of Appeals was entered on May 16, 1973. The present petition for a writ of certiorari was filed on August 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in the absence of a statute conferring original jurisdiction on the courts of appeals to review orders of the Maritime Subsidy Board the United States Court of Appeals for the Second Circuit was the proper court in which to seek initial review of an order of that Board.

2. Whether an order of the Maritime Subsidy Board which by its express terms was not a final order and which did not finally determine a number of significant matters involved in the proceeding was ripe for judicial review.

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[1] Opinions of the District Court and the Court of Appeals dealing with other phases of this litigation are reported as follows: *Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y.), *rev'd sub nom Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969); *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970); *Safir* v. *Gibson*, 330 F. Supp. 225 (E.D.N.Y. 1971); and *Safir* v. *Blackwell*, 469 F.2d 1061 (2d Cir. 1972).

STATEMENT

The present petition arises out of an investigation currently in progress by the Maritime Subsidy Board of the Department of Commerce to determine whether certain members of an approved shipping conference, Atlantic and Gulf American Flag Berth Operators (AGAFBO), violated Section 810 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. Section 1227, and if so what action should be taken. Of the 19 lines which were members of AGAFBO, those involved in the investigation are all the subsidized members, including the four respondents represented herein (referred to in this proceeding as the "non-trade respondents") and five other carriers (referred to in this proceeding as the "trade respondents").

The investigation resulted from a complaint to the Maritime Subsidy Board and the Acting Maritime Administrator by Sapphire Steamship Lines, Inc., an ocean carrier, and its two stockholders, petitioner Marshall P. Safir and Arnold Weisberger, that the trade and non-trade respondents had violated Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. Section 1227, during the period March 29, 1965 to March 1, 1966 by virtue of action of certain AGAFBO carriers in setting, filing and maintaining reduced rates on military cargo moving between U.S. Atlantic and Gulf Coast ports and ports in the Bordeaux-Hamburg and United Kingdom range, on which Sapphire operated. In the complaint Sapphire demanded that the Maritime Subsidy Board terminate all further subsidy payments to the subsidized members of AGAFBO and recover all subsidies paid to them since March 29, 1965.

Following litigation in the United States District Court for the Eastern District of New York and the

United States Court of Appeals for the Second Circuit respecting the nature of the proceeding before the Board, the Maritime Subsidy Board commenced the proceeding involved here, Docket S-243, by ordering a hearing. The Board's Chief Hearing Examiner (now Chief Administrative Law Judge) served a Recommended Decision in which he found that the trade respondents had violated Section 810, and should be required to repay various amounts of subsidy, but that the non-trade respondents—because they did not serve the Bordeaux Hamburg/United Kingdom trade to which the rate reductions applied, and had not set, filed, used, voted on or, under the AGAFBO agreement, been entitled to vote on the rates involved—had not violated Section 810. (Pet. App. 19a)

On exceptions to the Recommended Decision, the Board issued on April 16, 1973, an opinion and order in which it adopted the Chief Administrative Law Judge's finding of violation of Section 810 by the trade carriers, and his conclusion that substantial subsidies should be collected from them. The Board also found that the non-trade carriers had committed "technical" violation of Section 810 merely by continuing as members of AGAFBO during the period of illegal rate-making activity, but concluded that no repayment of subsidies should be sought from them in view of the purely technical nature of the violation by those carriers. (Pet. App. 38a)

Inasmuch as at the time it issued its opinion and order the Board needed additional documentation on which to base a determination of the final amounts of subsidy to be repaid by the various trade carriers, the Board expressly provided that its decision should not become final until such documentation had been sub-

mitted and an order on final recoveries issued. (Pet. App. 86a-87a). Such documentation has been submitted and it is anticipated that an order on final recoveries will be issued shortly.

On April 27, 1973, petitioner filed a motion directly with the Court of Appeals for the Second Circuit to set aside all findings and conclusions of the Board with respect to amounts of subsidy owed by all respondents and to order the Board to recover all operating-differential subsidies paid to all subsidized members of AGAFBO on account of all operations during the eleven month period of violation. (Pet. App. 119a-120a). The Court of Appeals denied this motion without opinion on May 16, 1973 (Pet. App. 1a), and on August 3, 1973, petitioner Marshall P. Safir filed the present petition.[2]

ARGUMENT

There has been no final action by the Maritime Subsidy Board, nor, even if there had been final action, has petitioner sought review in a court with jurisdiction to entertain the matter. In these circumstances, the Court of Appeals properly refused to intrude itself into the decisional process at this stage.

1. The action of the Court of Appeals denying petitioner's motion to reverse certain findings of the Maritime Subsidy Board was clearly correct.

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[2] Although petitioner did not name the respondents represented herein as parties in this Court, these respondents are parties to the proceeding before the Maritime Subsidy Board and participated in the proceeding before the Court of Appeals by filing a brief in opposition to petitioner's motion. Thus they are clearly parties respondent in this Court pursuant to Rule 21(4) of the Rules of this Court.

The Court of Appeals had no jurisdiction to consider the merits of petitioner's motion, which sought direct judicial review by the Court of Appeals of a decision of the Maritime Subsidy Board. Courts of appeals have only the jurisdiction conferred on them by statute and no statute gives them original jurisdiction to review orders of the Maritime Administration relating to subsidy matters. Such jurisdiction resides only in the district courts, see, e.g., *Sea-Land Service, Inc.* v. *Connor,* 418 F.2d 1142 (D.C. Cir. 1969), or, where a party is seeking a money judgment from the Government, in the Court of Claims, see, *e.g., States Steamship Co.* v. *United States,* 192 Ct. Cl. 795, 428 F.2d 832 (1970).

2. The opinion and order of the Maritime Subsidy Board was not ripe for judicial review. The provisions for judicial review of agency action in the Administrative Procedure Act contemplate that judicial review is available only after "final agency action." 5 U.S.C. § 704. The opinion and order of the Maritime Subsidy Board of April 16, 1973, was clearly not such a "final agency action." The terms of the order expressly provided that it should not become final until the Board was in a position to make its final determinations on amounts of subsidy to be recovered. A vital part of the Board's order remains to be completed and the Board, quite properly, provided that no portion of the order is to be regarded as final—and thus reviewable on a piecemeal basis—until the Board has completed its entire task. Indeed, once issued an order of the Board is subject to the provisions of Department of Commerce Order No. 10-8, 46 C.F.R. Section 202.1 (1972 Rev.) which provide for review of Board decisions by the Secretary of Commerce, either on the Secretary's

own motion or an application of a party to the Board proceeding.

3. The sole ground petitioner asserts for grant of the writ can be found in the claim that the decision of the Court of Appeals and the opinion and order of the Maritime Subsidy Board holding that the Maritime Administration has some discretion to determine the extent to which past subsidy payments should be recovered pursuant to Section 810 "is in direct conflict with the decision of the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe.*" (389 U.S. 327; Pet. 6). As shown immediately above this substantive claim is not properly raised to this Court. But even if it were, it is patently without substance.

Overton held only that decisions of the Secretary of Transportation with respect to the use of federal funds to construct highways through public parks pursuant to Section 4(f) of the Department of Transportation Act of 1966, as amended, and Section 18(a) of the Federal-Aid Highway Act of 1968 are subject to judicial review pursuant to the standard for such review set forth in Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. Nothing in the action of the court below suggests an unwillingness to review actions or determinations of the Maritime Subsidy Board where properly put under review before it, and thus permit a claim of conflict with the holding of *Overton Park*. To the contrary, at an earlier stage of this proceeding, the Court of Appeals explicitly recognized the availability of judicial review of the ultimate decision of the Board in terms wholly consistent with those of the *Overton Park* decision. (Pet. App. 172a-173a)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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